No. 95-1199

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JUDITH CLINTON,

Petitioner,

vs.

MIDDLESEX MUTUAL ASSURANCE,

Respondent.

On Petition for Writ of Certiorari to the Connecticut Appellate Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED RESTATED

"May a court order a unilateral appraisal of the fire damage to an insured's home, against the wishes of the insured, without violating the insured's constitutional rights under the Fourth Amendment, which provides for protection against illegal search and seizure, or the Fourteenth Amendment, which guarantees the insured the right to due process, when the insured has alleged fraud, duress, misrepresentation and bad faith against the insurer regarding the claims handling procedures of the insurer?"

STATEMENT REQUIRED BY RULE 29.6

Respondent, Middlesex Mutual Assurance Company, discloses that it has no parent companies. It has one wholly owned subsidiary, a stock company, Midfield Corporation. It has no other corporate parents, subsidiaries or affiliates.

STATEMENT OF THE CASE

A. Counterstatement

The petitioner, Judith Clinton, seeks review of the Connecticut appellate court decision affirming the lower court order to compel the appraisal of the petitioner's April 23, 1993, fire loss pursuant to the terms of her homeowners insurance policy issued by the respondent, Middlesex Mutual Assurance Company. The petitioner's characterization of the issue as a violation of the petitioner's due process rights under the Fourteenth Amendment, and a violation of their protection against search and seizure under the Fourth Amendment, is raised for the first time in petitioner's writ for certiorari. There is nothing in the lower court's decision on this added question to warrant review and because it was not raised in the lower courts it does not merit consideration by this court.

B. History of the Case

On February 24, 1994, the respondent, Middlesex Mutual Assurance Company brought an action pursuant to Connecticut General Statutes §52-410 and §42-411 against its insureds, Edward and Judith Clinton, requesting the court compel an "appraisal" of a fire loss in accordance with the terms of their homeowners insurance policy, which occurred on the insured's premises on April 21, 1993. On March 8, 1994, the trial court granted the application as to Judith Clinton and ordered her to proceed with the appraisal. Petitioner, Judith Clinton, has at all times opposed said appraisal and has claimed that only the insured but not an insurer can invoke the appraisal provisions of a fire insurance policy. In addition she raised a number of procedural challenges in the court below. The constitutional issues raised by the petitioner in the question presented to this Court were not presented to the trial court.

The petitioner appealed the trial court's order compelling the appraisal in accordance with the terms of the insurance policy. Upon review, the appellate court affirmed the lower court decision holding that the petitioner could not prevail on her claims that: (1) the trial court lacked jurisdiction to order appraisal, (2) the trial court improperly granted the application to compel the appraisal, (3) the trial court failed to consider the rights of the parties, (4) Connecticut General Statutes §§ 52-410 and 52-411 provided statutory relief for only an aggrieved insured, not an insurer, and 5) the respondent had presented no evidence at trial of the appraisal agreement or of a dispute as to the value of the loss. *Middlesex Mutual Assurance Co. v. Clinton,* 38 Conn. App. 555, 556 (1995). The petitioner first raised her Fourth and Fourteenth Amendment claims in her petition for review in the Connecticut Supreme Court. The Connecticut Supreme Court denied discretionary review.

PROCEDURAL REASONS FOR DENYING THE WRIT

The petitioner failed to properly raise the constitutional issues in the lower courts. The petitioner has failed to present any valid reasons for the United States Supreme Court to accept the issue presented which was not previously briefed, argued or decided below. The petitioner for the first time attempts to question the constitutionality of the court's order compelling an appraisal. As a court of review, not one of first view, the United States Supreme Court has refused to consider a petitioner's claim which was not raised in the lower courts. *Oklahoma Tax Commissioner v. Chickasaw Nation,* __U.S.__, 115 S. Ct. 2214, 2219 (1995); *Yee v. City of Escondido, California,* 503 U.S. 519, 532 (1992); *Illinois v. Gates,* 462 U.S. 213, 218-220 (1983).

This case does not present a conflict with the laws of the United States and the State of Connecticut nor with any decisions of this Court.

The jurisdiction of this Court to review cases by way of certiorari was not conferred merely to give the defeated party another hearing. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). No type of case is more appropriately applicable to this reasoning than the case at bar.

In *Yee v. City of Escondido, California*, 503 U.S. 519 (1992), another case in which the petitioners did not raise their constitutional claim until filing a petition for certiorari in the in the California Supreme Court, which denied review, this Court held that, "[i]n reviewing the judgments of the state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider a petitioner's claim that was not raised or addressed below. *Id.* at 532, *citing Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). "As a court of review, not of first view, we will entertain issues withheld until merits briefing, 'only in the most exceptional cases.'" *Oklahoma Tax Commissioner v. Chickasaw Nation*, __U.S.__, 115 S. Ct. 2214, 2219 (1995). (citation omitted). The instant matter fits squarely within this standard as the question presented to this Court for review has never before been presented to any lower court and there are no exceptional circumstances or issues.

SUBSTANTIVE REASONS FOR DENYING THE WRIT

I.

WHETHER A COURT ORDER PURSUANT TO STATE LAW COMPELLING APPRAISAL OF A FIRE LOSS VIOLATES THE FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE.

Petitioners' invocation of the Fourth Amendment protection to deny the respondent access to her home for the purpose of

appraising the value of the loss is misplaced. The trial court did not ordered access to her premises and accordingly there is no state action. *See Michigan v. Clifford*, 464 U.S. 287 (1983). The trial court simply ordered a private dispute resolution by appraisal. Should the petitioner deny the appraisers and the umpire access to her property, it is unlikely that said appraisers would proceed to trespass upon her property. Indeed, there is no court order compelling access to the property. The petitioner can not be compelled against her wishes to produce her evidence. In such a case the appraisal process will have to proceed without the benefit of an on-site inspection. If that results in an award unfavorable to the petitioner (for example a finding of one dollar in nominal damages based on a lack of evidence) the petitioner will have no one to blame but herself.

II.

WHETHER A COURT ORDER PURSUANT TO STATE LAW COMPELLING APPRAISAL OF A FIRE LOSS VIOLATES THE INSURED'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Petitioner asserts that a court order compelling appraisal pursuant to the appraisal clause of a voluntarily acquired, statutorily authorized, and valid insurance policy violates her due process rights. A court order compelling appraisal does not amount to a determination liability under the policy. *Hamilton v. Liverpool London & Globe Ins. Co.*, 136 U.S. 242, 254 (1889). It determines the amount in controversy. *Id.* In *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151 (1931), this Court, in upholding the constitutionality of an appraisal clause in a fire insurance policy, held that the state has the power to prescribe a summary method of ascertaining the amount of loss so far as the substitute remedy is substantial and efficient, and so far as it satisfies the requirements of the Fourteenth Amendment. *Id.* at 159.

Connecticut General Statutes § 38a-307 is the prescribed standard fire insurance policy form for fire policies written in Connecticut. Said form includes an appraisal clause which provides a remedy which is not unreasonable and arbitrary, and which satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

CONCLUSION

For all of the above stated reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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